FIRMPOWER SDN BHD & ORS A

v.

GABRIEL DANA & ORS

HIGH COURT SABAH & SARAWAK, KUCHING B
RAVINTHRAN PARAMAGURU JC
[ORIGINATING SUMMONS NO: 24-216-2009-III]
9 NOVEMBER 2009

BETTING, GAMING AND LOTTERY: *Lottery - Licence - Business of selling tickets for numbers forecast totalisator - Whether a lottery - Whether licence must be obtained from the local authority - Local Authorities (Licensing of Miscellaneous Occupation) (Omnibus Amendment) (No. 2) By-Laws, 1995 - Whether exempted from licensing requirements - Racing (Totalisator Board) Act 1961* C D

CIVIL PROCEDURE: *Injunction - Interim injunction - Application for interlocutory injunction against local authority - Whether interim injunction can be issued against local authority*

CIVIL PROCEDURE*: Injunction - Suit against local government - Whether local authorities subject to injunctions* E

LOCAL GOVERNMENT: *Licence - City Council - Business of selling tickets for numbers forecast totalisator - Whether a lottery - Whether licence must be obtained from the local authority - Local Authorities (Licensing of Miscellaneous Occupation) (Omnibus Amendment) (No. 2) By-Laws, 1995 - Whether exempted from licensing requirements - Racing (Totalisator Board) Act 1961* F

The 1st and 2nd plaintiffs were related companies carrying out the business of Telelink, Number Forecast Totalisator and Totalisator. The 2nd plaintiff was also an appointed Selling Agent of Sweepstakes (commonly known as Big Sweep Jackpot) promoted by Pan Malaysian Sweeps Sdn. Bhd. since 2001 under the Racing Club (Public Sweepstakes) Act 1965 (Revised 1989). The 3rd plaintiff was one of the many telelink marketers that they had appointed throughout the state. The telelink marketers ran what was known as Telelink Service Centres. The public ('investors') had access to the business of the 1st and 2nd plaintiffs through these Telelink Service Centres. The "investment" of the public in the business of the plaintiffs was by participating in the so-called Number Forecast Totalisator (NFT) or more commonly known as Da Ma Cai or 1 + 3D. The NFT was based on the outcome of G H I

horse race meetings of the Penang, Perak and Selangor Turf Clubs. A correct prediction of the forecasted numbers would earn a reward many times the original "investment". The premises of the 3rd plaintiff were raided on the ground that they conducted a lottery business without a licence. The plaintiffs sought an interlocutory injunction to restrain the defendants from raiding and locking the premises of the 3rd plaintiff for alleged violation of the Local Authorities (Licensing of Miscellaneous Occupation) (Omnibus Amendment) (No. 2) By-Laws, 1995 ('the By-Laws'). The plaintiffs claimed that they did not run a lottery business on the premises of the 3rd plaintiff. According to the plaintiffs, the business of providing telelink services to the public to invest in NFT was not a lottery activity because betting on the outcome of horse race involves skill and not chance. The plaintiffs also claimed that the 1st plaintiff had been given approval to set up totalisator agencies in Sarawak by the Lembaga Totalisator Malaysia under the Racing (Totalisator Board) Act 1961 ('the Act') and therefore the 3rd plaintiff did not need a licence from the Municipal Council of Padawan. Counsel for plaintiff further referred to s. 27 of the Common Gaming Houses Act 1953 ('CGHA53') which excludes a sweepstake promoted by a racing club from falling within the ambit of the Act. The defendants argued that the business came within the definition of lottery and therefore a licence was required under the By-Laws. According to the defendants, as the winning numbers were drawn from electro-magnetic drums, there was no element of skill involved and therefore the telelink service provided by the 3rd plaintiff was a lottery.

Held (dismissing the application with costs):

(1) An interlocutory injunction, unlike a perpetual injunction can be granted against a local authority if the applicant can demonstrate that there is a serious issue to be tried. (para 2)

(2) The game in question was a game of chance with no element of skill involved insofar as the players or the so-called "investors" were concerned. By placing the bets by "investing" in a four-digit NFT at the premises of the 3rd plaintiff, the participants of the game need not know anything about the horses or the jockeys that were taking part in the race. The participants were not selecting any horse or any combination of horses that they thought would win the race. They were merely selecting a four-digit number for the NFT game. In the premises, the game in question was a game of lottery. (para 13)

(3) Under s. 22(2) of the Act, an approved totalisator scheme would not attract any of the penal provisions of the CGHA53, the Betting Act 1953, the Pool Betting Act 1967 (Revised 1989) ('PBA67') or any law relating to gaming, betting or lotteries. However, the By-Laws in question is not a law envisaged by s. 22(2). Section 22(2) of the Act cannot apply to municipal by-laws that are merely concerned with licensing of occupations. (para 16)

(4) The object of the CGHA53 is to suppress common gaming houses, public gaming and public lotteries. The general scheme of CGHA53 is that all common gaming houses and all lotteries are illegal unless licensed with the exception of a sweepstake lottery by a racing club. Therefore, s. 27 of CGHA53 does not affect other laws such as the By-laws in question. (para 18)

(5) Section 32(3) of the PBA67 provides that one does not need a licence under the PBA67 if the betting scheme is approved by the Totalisator Board. This saving provision is only relevant for the purpose of the PBA67 and does not apply to the By-laws in question. A similar situation applies in respect of s. 20 of the Betting Act 1953. (para 19)

Case(s) referred to:

Dr KR Lakshmanan v. State of TN & Anor [1996] 2 SCC ***(refd)***
Kang Yeow Hooi & Ors v. PP [1954] 1 LNS 31 HC ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***
Lim Seah Pong v. PP [1956] 1 LNS 57 HC ***(refd)***
Reader's Digest Association Ltd v. Williams [1976] 3 All ER 737 ***(refd)***
Stoddart & Ors v. Sagar [1895-9] All ER Rep Ext 2048 ***(refd)***
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1982] 1 LNS 83 HC ***(refd)***

Legislation referred to:

Betting Act 1953, s. 20
Common Gaming Houses Act 1953, s. 27A
Pool Betting Act 1967 (Revised 1989), s. 32(3)
Racing (Totalisator Board) Act 1961, s. 22(2)

For the plaintiffs - Wong Sing Nang; M/s Wong, Orlando Chua & Kuok Advocates
For the respondent - Datuk JC Fong (Safri Ali & Marjanah with him); State AG's Chambers

Reported by Amutha Suppayah

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an application for interlocutory injunction by the three plaintiffs to restrain the defendants from raiding and locking the premises of the 3rd plaintiff for alleged violation of the Local Authorities (Licensing of Miscellaneous Occupation) (Omnibus Amendment) (No. 2) By-Laws 1995 made under the Local Authorities Ordinance (Chapter 20), Sarawak.

Background Facts

[2] The 1st and 2nd plaintiffs are related companies that carry out the business of Telelink, Number Forecast Totalisator and Totalisator. The 2nd plaintiff is also an appointed Selling Agent of Sweepstakes (commonly known as BIG SWEEP JACKPOT) promoted by Pan Malaysian Sweeps Sdn. Bhd. (PMS), a sister company of Pan Malaysian Pools Sdn. Bhd. (PMP) since 2001 under the Racing Club (Public Sweepstakes) Act 1965 (Revised 1989). The 3rd plaintiff is one of the many telelink marketers that they had appointed throughout the state. The telelink marketers run what is known as Telelink Service Centres. The public (or investor as referred to by the plaintiffs) has access to the business of the 1st and 2nd plaintiffs through these Telelink Service Centres. The "investment" of the public in the business of the plaintiffs is by participating in the so-called Number Forecast Totalisator (NFT) or more commonly known as Da Ma Cai or 1 + 3D. The NFT is apparently based on the outcome of horse race meetings of the Penang, Perak and Selangor Turf Clubs. It is understood that a correct prediction of the forecasted numbers would earn a reward many times the original "investment". The first three defendants are employees of the Padawan Municipal Council. The premises of the 3rd plaintiff were raided on 30 May 2009 on the ground that they conducted a lottery business without a licence as required by the above mentioned by-law. It is not in dispute that the third plaintiff did not possess the said licence. In the statement of claim, the plaintiffs have prayed for a permanent injunction and relief against the defendants from raiding the premises of the 3rd plaintiff and prevent them from conducting their business. It is the law that an interlocutory injunction, unlike a perpetual injunction can be granted against a local authority if the applicant can demonstrate that there is a serious issue to be

tried (see *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1982] 1 LNS 83 and *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293). The determination of this issue hinges on the legality of the raid conducted by the 4th defendant and its agents.

Issues

[3] The argument that underpins the entire case of the plaintiffs is that they did not run a lottery business on the premises of the 3rd plaintiff. Therefore, the plaintiffs contend that they have "a good and arguable case" against the defendants. On the other hand, the defendants argued that the business that was conducted on the premises came within the definition of lottery and therefore a licence was required under the Local Authorities (Licensing of Miscellaneous Occupation) (Omnibus Amendment) (No. 2) By-Laws 1995. Under the By-laws, any person who carries on a business as an agency for the conduct and sale of any licensed lottery is required to have a licence from a local authority. This is the principal argument of the defendants. The plaintiffs' second argument is that the 1st plaintiff had been given approval to set up totalisator agencies in Sarawak by the Lembaga Totalisator Malaysia under the Racing (Totalisator Board) Act 1961. Therefore as the business of the plaintiffs falls under the purview of the Racing (Totalisator Board) Act 1961 and the Lembaga Totalisator Malaysia which was set up under said Act, the 1st and 2nd plaintiff and those authorised by them such as the 3rd plaintiff, do not need a licence from the Municipal Council of Padawan.

Whether The Business Of The 3rd Plaintiff Fell Within The Meaning Of "Lottery"?

[4] The above by-law, apart from stating that an annual licence fee of RM1,000 is payable by the "Agency for the conduct or sale of any licenced lottery", does not contain any definition of "lottery". In *Kang Yeow Hooi & Ors v. Public Prosecutor* [1954] 1 LNS 31, Mathew CJ said defined the essential character of a lottery as follows:

> In our view, the essence of a lottery is the distribution of money or money's worth which is determined by lot or chance. The elements of distribution and chance must both be present.

[5] In the case of *Lim Seah Pong v. Public Prosecutor* [1956] 1 LNS 57, Thomson CJ referred to English Law where "lottery" is not statutorily defined:

> There is no statutory definition of a lottery in England but the Courts there have generally accepted the definition in Webster's Dictionary "a distribution of prizes by lot or chance", and I can see no difference in principle between this definition and our statutory definition. In the English cases the question at issue has almost invariably been whether the distribution of prizes has been based purely on chance or whether some exercise of skill has been called for on the part of those taking part.

[6] The definition discussed in most of the Malaysian and Singapore cases is in relation to the statutory definition of lottery found in the Common Gaming Houses Act 1953 which is as follows:

> "Lottery" includes any game, method, or device whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot, whether the same be held, drawn, exercised, or managed within or without the Federation;

[7] Learned counsel for plaintiffs and defendants have referred to the above definitions and appeared to agree that the element of chance is the pre-requisite of a lottery. However, counsel for plaintiffs has submitted that the business of the plaintiffs in providing telelink services to the public to invest in NFT is not a lottery activity because betting on the outcome of horse race involves skill and not chance. He submitted that the NFT is based on numbers assigned to horses taking part in race meetings (horse races) in Turf Clubs. The corollary to that argument is that the activity of plaintiffs does not contravene the municipal by-law in question that requires a licence for any agency that conducts or sells a lottery.

[8] Learned counsel for plaintiff cited a number of cases that dealt with betting activity based on the outcome of horse racing. In the English case of *Stoddart & Ors v. Sagar* [1895-9] All ER Rep. Ext 2048 Pollock B J said as follows:

> As to the meaning of the word "lottery", my learned brother, Day, J, is clear: "I am clearly of opinion that this was not a lottery, for there was no contrivance or device to obtain money by chance. That is to say, a horse race is clearly not a matter of

chance. Upon the running of the four horses named as the first, second, third, and fourth, and their being placed as the first, second, third, and fourth, the event depended. That shows with equal clearness that this was not a lottery."

[9] In the Indian case of *Dr. K. R. Lakshmanan v. State of T.N. & Anor* [1996] 2 SCC, the court cited the following passage from an American judgment and held that betting on the outcome of a horse race is not a game of lottery:

> The winning horse is not determined by chance alone, but the condition, speed, and endurance of the horse, aided by the skill and management of the rider or driver, enter into the result … In our opinion the pari-mutuel system does not come within the constitutional inhibition as to lotteries … 'In horse-racing the horses are subject to human guidance, management, and urging to put forth their best efforts to win.'

[10] In the case of *Earl of Ellesmere v. Wallace*, Russel LJ said as follows:

> To the unsophisticated racing man (if such there be) I should think that nothing less like a bet can well be imagined. It is payment of entrance money to entitle an owner to compete with other owners for a prize built up in the part by entrance fees, the winning of the prize to be determined not by chance but by the skill and merit of horse and jockey combined …

[11] For good measure, counsel for plaintiff also referred to the generally accepted definition of lottery in English law. In the case of *Reader's Digest Association Ltd. v. Williams* [1976] 3 All ER 737, the court defined a game of lottery in the following terms:

> A lottery is the distribution of prizes by chance where the persons taking part in the operation, or a substantial number of them, make a payment or consideration in return for obtaining their chance of a prize. There are really three points one must look for in deciding whether a lottery has been established: first of all, the distribution of prizes; secondly, the fact that this was to be done by means of a chance; and thirdly, that there must be some actual contribution made by the participants in return for their obtaining a chance to take part in the lottery.

[12] I appreciate the argument of counsel for plaintiff that this hearing is merely an interlocutory injunction application and not a full trial. The defendants however have not disputed the affidavit evidence of the plaintiffs on the mechanics of determination of the

winner of the game in question. Therefore this court is in a position to determine whether there is a serious issue to be tried or whether plaintiffs have a good prospect of success in the main action by making a provisional finding whether the game in question is a "lottery" or otherwise.

[13] Based on the affidavit of Christopher Tiong, who is the Chief Executive Officer of the 1st and 2nd plaintiffs, counsel for plaintiffs submitted that a person who makes an investment in NFT may win a prize based on the outcome of a horse race or what is known in the business as a "race meeting". Counsel for plaintiff had addressed a lengthy submission on the method of selection of the winners. I shall attempt to summarize it as follows. A total of 23 prizes are awarded for the game; 10 consolation prizes, 10 starter prizes and the 1st, 2nd and 3rd prizes. If 13 horses take part in a race meeting, the selection of the winners is as follows. The 10 consolation prizes are drawn from four drums that contain balls number 0-9. All drums are operated electro-magnetically. I pause to note here that the selection of the consolation prizes is no different from that of pool betting lottery in that the outcome is determined purely by the electro-magnetic drums. In other words, pure chance or the roll of dice determines who gets the consolations prizes. I now move on to discuss the selection of the remaining 13 prizes. Again, four electro-magnetic drums are involved in picking the 13 four-digit winning numbers. If 13 horses were to take part in the particular race meetings, 13 four-digit combination numbers would be drawn from four drums (with balls marked 0-9). At the same time, a fifth drum (with balls marked 1-13 to represent Horses) would be drawn to simultaneously assign the 13 four-digit combination numbers to each of the 13 horses taking part in the race meeting. This means that each of the 13 horses that take part in the race would be assigned a four-digit number. The 1st to 3rd winner of the game would be decided at the finishing line of the horse race. The other ten winners are called "starter prize" winners. Counsel for plaintiff submitted that as the final outcome is based on the skill of the horses and the jockeys, the element of chance that defines a game of lottery is absent. Counsel for defendant submitted that as the winning numbers are drawn from the electro-magnetic drums, there is no element of skill involved and therefore the game in question to which the public has access through the telelink service provided by the 3rd plaintiff is a lottery. I am in complete agreement with counsel for defendant that the game in question

is a game of chance with no element of skill involved insofar as the players or the so-called "investors" are concerned. Counsel for plaintiff was at pains to emphasize that the winning numbers in a lottery under the Pool Betting Act 1967 like Magnum 4D are determined purely by chance. I do not see any difference in the game offered by the plaintiffs. Based on the definition of lottery (*Reader's Digest Association Ltd. v. Williams* [1976] 3 All ER 737) as submitted by Counsel for plaintiffs, three elements are essential:

(1) distribution of prizes or in other words payment of a monetary reward;

(2) the winner was determined by chance; and

(3) there must be some actual contribution made by the participants in return for being allowed to take part in the game.

[14] There is no dispute in respect of the first and third element, although different terminology was employed. The so-called "investors" would "invest" in a four-digit number forecast by making a payment at the premises of the 3rd plaintiff. Upon payment, a slip that the plaintiffs called a "temporary receipt" would be issued. If the numbers had been correctly predicted, the participant would be entitled to a prize which is actually payment of money depending on the pool collected for that particular race. The point of contention is whether the winner had exercised any skill in winning the prizes or had relied on pure chance. I think it is very important to note that the betting involved is off-course betting. This means that the players of the game are not at the race course. The second point to note is that at the point of placing the bets by "investing" in a four-digit NFT at the premises of the 3rd plaintiff, the participants of the game need not know anything about the horses or the jockeys that are taking part in the race meeting. This is because the participants are not selecting any horse or any combination of horses that they think would win the race. They are merely selecting a four-digit number for the NFT game. Indeed it would be impossible for them to select numbers based on the skill and ability of the horses or jockeys. The simple reason is this. All the 23 four-digit winning numbers are selected by the electro magnetic drums. The first 10 are considered "consolation" prizes. The rest of the 13 four-digit numbers are assigned to the 13 horses that are taking part in the race. This means that the horse race would merely decide the

winning order of 13 four-digit combination numbers that had already been selected by the electro-magnetic drums, ie, the selection of the 1st, 2nd, 3rd and ten starter prizes. In short, the horse race merely determines the order of the 13 winners already picked by electro-magnetic drums. Therefore, an "investor" who is actually a punter, has no opportunity to bet on any particular horse. Once the 23 four-digit numbers are drawn from the electro-magnetic drums, his fate is sealed if his four-digit combination number is not among them. He has lost his bet even before the horse race started. If his four-digit number is picked by the electro magnetic drums during the selection of the consolation prizes, it goes without saying that he has won one of the 10 consolation prizes. If he is luckier, his four-digit number may be among the 13 four-digit numbers selected by the electro-magnetic drums for the purpose of the race meeting. If that were to happen, he is already a winner and the horse race would merely determine the order of win of the 13 four-digit numbers ie, the selection of the 1st, 2nd 3rd and ten starter prizes. Therefore, with respect to counsel for plaintiffs, I cannot see how the skill of the "investor" has anything to do with a win or a loss. It is chance alone that determines the outcome. As counsel for defendant pithily observed, the participants in the game in question cannot "pick" any particular horse but can only "pick" a four-digit combination number like any other punter in a number forecast lottery. Counsel for plaintiff also argued that, unlike other number forecast lottery that is not based on a horse race, a "dead heat" situation could occur at the finish line where two horses win the first prize and the second prize is not awarded. However, the fact remains that all the 13 winning four-digit numbers assigned to the horses including those involved in the "dead heat" are picked by the electro-magnetic drums. In the premises, based on the case of the plaintiffs themselves, I am of the opinion that the game in question is a game of lottery.

Other Issues

[15] Learned counsel for plaintiff submitted at length on the totalisator scheme approved by the Lembaga Totalisator Malaysia which his clients claim to have faithfully adhered to. He submitted that since the NFT game promoted by the plaintiffs fell within the ambit of the Racing (Totalisator Board) Act, the by-law in question cannot apply to them. He based his argument on s. 22(2) of the Act which reads as follows:

22. Authority of totalisator operations and investments in accordance with approved scheme.

(1) ...

(2) Where any totalisator is operated in accordance with an approved scheme no person shall be liable in respect of the use of such totalisator to any penalty or forfeiture under the Common Gaming Houses Act 1953, or the Betting Act 1953, or *any law for the time being in force relating to gaming, betting or lotteries.* (emphasis added).

[16] It is quite clear that the effect of the above provision is that an approved totalisator scheme would not attract any of the penal provisions of the Common Gaming Houses Act 1953, the Betting Act 1953 or the Pool Betting Act 1967 (Revised 1989). However, the position is not clear *vis a vis* the by-law in question. Counsel for plaintiffs argued that s. 22 covers "any law for the time being in force". In my opinion, the provision should be read as a whole to gather its meaning. Section 22(2) does not merely refer to any law for the time being in force but also to a law relating to gaming, betting or lotteries. The law in question here is the Local Authorities (Licensing of Miscellaneous Occupation) (Omnibus Amendment) (No. 2) By-Laws 1995 made under the Local Authorities Ordinance (Chapter 20), Sarawak. The question that arises is whether this by-law is a law relating to gaming, betting or lotteries. In my opinion as the by-law in question is a municipal by-law to regulate licensing of occupations, I do not think that it is a law envisaged by s. 22(2) of the Racing Totalisator Act. The only reference to a lottery in the said by-law is in the First Schedule where it is stated that any agency that conducts a lottery must pay RM1,000 per year for a licence. There are no provisions in the said by-law that governs gaming, betting or lotteries. The other laws referred to by s. 22, ie, Common Gaming Houses Act 1953, Pool Betting Act and Betting Act, are all laws that contain elaborate provisions to restrict, regulate and even criminalize gaming, betting and lotteries. That is the reason for the saving provision that is found in them so that there is no conflict with totalisator schemes approved under Racing (Totalisator Board) Act 1961. Therefore, s. 22(2) of the Racing (Totalisator Board) Act 1961 cannot apply to municipal by-laws that are merely concerned with licensing of occupations.

[17] Similarly counsel for plaintiff also referred to s. 27 of the Common Gaming Houses Act which excludes a sweepstake promoted by a racing club from falling within the ambit of the Act. The provision reads as follows:

> **27. Saving**
>
> Nothing in this Act contained shall affect any lottery authorized or licensed under the provisions of the Social and Welfare Services Lotteries Board Act 1950-1962 [Act 252], or of the Lotteries Act 1952 [Act 288] *or any sweepstake promoted by a racing club* established in Malaysia on the result of a horse race and any *reference in this Act to gaming or to a lottery shall be deemed not to include a reference to any form of gaming or to any lottery so authorized or licensed* (emphasis added)

[18] In my opinion, s. 27 of the Common Gaming Houses Act 1953 is only relevant for the purpose of the said Act. The object of the Act is stated in its preamble, ie, to suppress common gaming houses, public gaming and public lotteries. The general scheme of the said Act is that all common gaming houses and all lotteries are illegal unless licensed (see s. 27A). However, the above provision makes an exception in the case of a sweepstake lottery by a racing club. The above provision does not purport to affect other laws such as the by-law in question. Similarly under the Pool Betting Act 1967 (Revised 1989), s. 32(3) enacts as follows:

> **32. Saving**
>
> (3) Nothing in this Act shall affect the Racing (Totalisator Board) Act 1961 (10 of 1961), with respect to the conducting of betting by the Totalisator Board or totalisator agencies established or any turf club authorized under that Act.

[19] This provision simply means that one does not need a licence under the Pool Betting Act 1967 (Revised 1989) if the betting scheme is approved by the Totalisator Board. Again, this saving provision is only relevant for the purpose of the Pool Betting Act 1967 (Revised 1989). This provision does not purport to apply to all laws including the by-law in question. A similar situation applies in respect of s. 20 of the Betting Act 1953.

Conclusion

[20] In this instant case, the 1st to 3rd defendants are officers of a local authority who purportedly carried out their statutory duty. The burden is on the plaintiffs to satisfy the court that there is a serious issue to be tried before obtaining an interlocutory injunction. For the reasons given above, I am of the view that they have not raised a serious issue to be tried. The application for interlocutory injunction is dismissed with costs.